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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92050789
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UNITED STATES PATENT AND TRADEMARK OFFICE
TRADEMARK TRIAL AND APPEAL BOARD

NARTRON CORPORATION

Petitioner,

v.

Cancellation No. 92050789

HEWLETT-PACKARD
DEVELOPMENT COMPANY, L.P.,

Respondent.

PETITIONER'S REBUTTAL BRIEF

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I. REPLY

HP's statement of the issue before the Board should be corrected at the outset. HP improperly states the issue as whether "Respondent's mark TOUCHSMART, used in connection with personal computers, computer hardware, computer monitors and computer display screens," "is likely to be confused *by the sophisticated purchasers of its products*, with Petitioner's mark SMART TOUCH, used in connection with electronic proximity sensors and switching devices." (*Emphasis added.*)

This statement of the issue requires correction because it is in conflict with the rule that if the registration describes the goods broadly, and there is no limitation as to the nature, type, channels of trade, or class of purchasers, it is assumed that all goods of the type described move in all normal channels of trade and that they are available to all classes of purchasers. *In re Thor Tech, Inc.*, 90 USPQ 2d 1634, 1638 (TTAB 2009).

The broad term "computer hardware" comprehends all types of products under this description, whether components, stand-alone devices, or systems.

II. DISCUSSION

The following addresses Respondent's analysis of certain *duPont* factors in like order:

A. EVIDENCE OF ACTUAL CONFUSION

HP should be well-aware that evidence of actual confusion is not necessary in order for there to be a likelihood of confusion. This Board has consistently held that evidence of actual confusion is not necessary to prove a *likelihood* of confusion. However, HP alleges in its brief that the marks have coexisted in the marketplace for three (3) years without evidence of actual confusion, and that such alleged coexistence without confusion is “‘powerful indication’ that the TOUCHSMART mark does not cause a meaningful likelihood of confusion.” HP Main Brief at p. 11. HP cites *Nabisco, Inc. v. PF Brands, Inc.*, in which the Court of Appeals for the Second Circuit stated: “If consumers have been exposed to two allegedly similar trademarks in the marketplace *for an adequate period of time* and no actual confusion is detected either by survey or in actual reported instances of confusion, that can be powerful indication that the junior trademark does not cause a meaningful likelihood of confusion,” citing *McGregor-Doniger, Inc. v. Drizzle, Inc.*, 599 F.2d 1126, 1136 (2d Cir. 1979). *Nabisco, Inc. v. PF Brands, Inc.*, 191 F.3d 208, 228 (2d Cir. 1999) (*emphasis added*). In the *McGregor-Doniger* case, the Plaintiff conceded ignorance of Defendant's mark from 1969-1974, sent a cease and desist letter in 1974, and brought suit in 1975 – after the marks coexisted in the marketplace for six (6) years. The present situation is quite different. HP filed its TOUCHSMART application June 4, 2007, claiming use from January 29, 2007. The application registered April 7, 2009 and Nartron

petitioned to cancel two (2) days later.¹ If the Board determines that HP provided adequate evidence of use from January 2007, the longest that the marks coexisted before Nartron first contacted HP regarding its use of TOUCHSMART is 1 year, 10 months and 23 days. *See Copy Cop, Inc. v. Task Printing, Inc.*, 908 F. Supp. 37, 45-46 (D. Mass. 1995) (holding that two years of coexistence was not enough time to give significance to lack of evidence of actual confusion); *see also Borinquen Biscuit Corp. v. M.V. Trading Corp.*, 443 F.3d 112, 78 USPQ2d 1454 (1st Cir. 2006) (just over a year of coexistence is not long enough to give weight to the lack of evidence of actual confusion).

In addition, there is no evidence of the parties' geographic areas of sales, or the amount of the sales under the respective marks. Absent some context, no negative inference should be drawn from the lack of evidence of actual confusion.

B. SIMILARITY OF THE PARTIES' GOODS

1. The Goods Identified in the Registrations

Although HP clearly recognizes that the similarity of the parties' goods "must be decided on the basis of the identification of goods or services set forth in the application [or registration], regardless of what the record may reveal as to the particular nature of applicant's goods, the particular channels of trade, or the class of purchasers to which sales of the goods or services are directed," HP attempts to distinguish the parties' goods by arguing that the consumers for the parties' goods are different. *Packard Press, Inc. v. Hewlett-Packard Co.*, 227 F.3d 1352, 1359 (Fed. Cir. 2000); HP Main Brief at p. 12. However, potential distinctions in the classes of purchasers do not prove that the goods, *as identified in the registrations*, are different.

¹ The parties' previous correspondence, beginning in December 22, 2008, is not of record in this proceeding.

HP repeatedly and inaccurately identifies its relevant product as merely “personal computers” in its *duPont* analysis, all the while arguing that it does not sell component parts. However, the goods identified in the TOUCHSMART registration are “personal computers, *computer hardware*, computer monitors, computer display screens.” (*Emphasis added.*) The broad descriptor “computer hardware” encompasses far more than “personal computers” (a separate description in the identification of goods). The scope of the term “computer hardware” extends to the electronic proximity sensors and switching devices of Nartron’s asserted registration, and to that extent, the parties’ identified goods are legally identical.

It is worth noting that HP has not presented evidence to contradict Ms. Neumann’s testimony that HP’s rugged touch screen notebook and tablet computers (products that are encompassed by the TOUCHSMART registration goods identification) for in-vehicle use might be sold under the TOUCHSMART trademark.

2. Market and Consumer Overlap

HP argues that typical purchasers for Nartron’s SMART TOUCH products are “businesses and manufacturers of products.” HP Main Brief at p. 15. These are the same customers that HP identifies as among the customers for its TOUCHSMART products. The same individuals encounter both brands.

Further, the issue is whether “the conditions and activities surrounding the marketing of the goods are such that they would or could be encountered by the same persons under circumstances that could, because of the similarity of the marks, give rise to the mistaken belief that they originate from the same producer.” *In re Hal Leonard Publ’g Corp.*, 15 U.S.P.Q.2d 1574, 1575 (TTAB 1990), *citing In re International Telephone and Telegraph Corporation*, 197 USPQ 910, 912 (TTAB 1978); TMEP 1207.01(a)(i) (2009). It may be that the

only persons in a position to confuse the marks would be those familiar with one mark in their trade or industry who happen to encounter the other mark in their business or perhaps when doing their personal retail shopping. See Richard L. Kirkpatrick, Likelihood of Confusion in Trademark Law (Practicing Law Institute Intellectual Property Law Library) 5:12.6 (2010). The same person may be sophisticated as to one product in one channel and may be an ordinary consumer of the other product in another channel. *Id.* Therefore, such a person may be confused in the different context. *Id.* “This Board has had occasion to identify employee groups exposed to special purpose or restricted sale items in their particular trades as part of the general consuming public who could be confused by identical or highly similar marks on related goods encountered in each context.” *Chesebrough-Pond's Inc. v. C.R. Bard, Inc.*, 216 USPQ.333, 336 (TTAB 1982), citing *Basic Vegetable Products, Inc. v. Joseph Gangi & Sons, Inc.*, 160 USPQ 501, 504 (TTAB 1968) (possible confusion from contact with highly similar marks as food industry workers and retail purchasers).

In *Basic Vegetable Products*, Opposer used FRESH FLAVOR on containers and packages in which it distributed its dehydrated onion and garlic products. *Basic Vegetable Products, Inc.*, 160 USPQ at 505. Opposer's goods were not packaged in sizes suitable for direct retailing to housewives and at least 90% of the time the retail packers, “e.g., the A & P chain of supermarkets,” repackaged the goods under their own name and label. *Id.* The Applicant applied to register FLAVOR-FRESH for “fresh fruits, namely, lemons, oranges, pears, grapes, grapefruit, tangerines, bananas, tangelos and tomatoes; dry nuts; shredded cabbage for coleslaw; and fresh vegetables, namely, cabbage, onions,” etc. *Id.* The Board refused registration and held that “there is a likelihood that those familiar with the use of dehydrated vegetables bearing the designation ‘FRESH FLAVOR’ in the production of food will, upon encountering ‘FLAVOR-

FRESH’ fresh fruits and vegetables, mistakenly assume that they originate from the same source.” *Id.*

The facts in *Basic Vegetable Products* correspond with the present situation. It should go without saying that there are people making purchasing decisions for “businesses and manufacturers of products.” Such decision-makers may also be “financially well-off, technologically savvy and style-conscious individuals” – the same individuals that HP identifies as its targeted retail consumers. HP Main Brief at p. 15. Such individuals familiar with Nartron’s SMART TOUCH mark for electronic proximity sensors and switching devices, will, upon encountering HP’s TOUCHSMART computer products, mistakenly assume that they originate from the same source. The same individuals encounter both brands.

C. CIRCUMSTANCES OF PURCHASE

HP argues that the circumstances of purchase and the sophistication of the customers demonstrate that confusion is unlikely. HP Main Brief at p. 18. This argument ignores the rule that “all classes of purchases” is the standard, unless the identification of goods is restricted. *In re Thor Tech, Inc., supra*, 90 USPQ 2d at 1638. HP’s identification of goods is not restricted by class of customer. Therefore, the correct standard is “the average purchaser who normally retains a general, rather than specific, impression of trademarks.” *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975).

Moreover, where, as here, the products are legally identical and the marks are identical, “the sophistication of buyers cannot be relied upon to prevent confusion.” *McGregor-Doniger, Inc. v. Drizzle, Inc.*, 599 F.2d 1126, 1137, 202 USPQ 81, 92 (2d Cir. 1979). Indeed, the Board has observed that “today’s computer buyers cannot be uniformly classified as a technically adept or highly discriminating group.” *In re Graphics Technology Corp.*, 222 USPQ 179, 181 (TTAB 1984) (finding AGILE for software confusing similar to AGILE for computer

data terminals). Therefore, contrary to HP's unsupported characterization of its TOUCHSMART customers as sophisticated consumers, "the growing tendency is for computers and computer programs to be purchased and operated by the general public. Business, home and educational use of computers has expanded the computer market to encompass many poorly informed and unsophisticated purchasers." *In re Linkvest SA*, 24 USPQ2d 1716, 1716-1717 (TTAB 1992). As such, the "sophisticated purchaser" argument does not reduce the likelihood of confusion in the present proceeding.

D. CHANNELS OF TRADE

HP goes on to claim that, despite the lack of any limitation in the relevant registrations, the "*reasonable* trade channels" for the parties' respective goods are not comparable. HP Main Brief at p. 20 (*emphasis added*). Again, the Board can assume that the parties' goods are sold in all *normal* trade channels, as the parties' registrations contain no limitations. Neither parties' respective identifications of goods are restricted as to purchasers or trade channels. Thus, the Board must consider that the parties' respective goods could be offered and sold to the same classes of purchasers – including the general public, through all normal channels of trade. *See Canadian Imperial Bank v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987); *In re Smith and Mehaffey*, 31 USPQ2d 1531 (TTAB 1994); and *In re Elbaum*, 211 USPQ 639 (TTAB 1981).

Moreover, Nartron established that the parties' normal channels of trade overlap such that the goods would be likely to be encountered by the same persons under circumstances which could, because of the similarity of the marks used thereon, give rise to the mistaken belief that the goods are in some way associated with the same producer. Nartron presented evidence – in part, through HP's own testimony – that HP's customers are not limited to the individual or

family, and HP concedes that it also targets various industries. Indeed, HP has not presented evidence to contradict Ms. Frankart's testimony that automotive companies are potential customers. As such, it is evident that the parties' channels of trade overlap.

Furthermore, the parties' present methods of distribution should not be given much weight, as marketing methods are always subject to change. As the Court of Customs and Patent Appeals stated:

It is pertinent to note that the goods identified in appellant's application are not restricted to any particular channel of distribution. *Present* sales and methods of distribution are not conclusive and do not, in our judgment, form a proper basis for finding lack of likelihood of confusion or mistake when the identical trademarks are used on the respective goods of the parties.

J. C. Hall Co. v. Hallmark Cards, Inc., 340 F.2d 960, 964, 52 CCPA 981, 986 (CCPA 1965), citing *Meyer Chemical Co. v. Anahist Co., Inc.*, 263 F.2d 344, 46 CCPA 784 (CCPA 1959); *Daggett & Ramsdell, Inc. v. I. Posner, Inc.*, 277 F.2d 952, 47 CCPA 952 (CCPA 1960).

E. SIMILARITY OF THE MARKS

1. SMART TOUCH and TOUCHSMART are Similar

As one of its final points, HP attempts to distinguish the parties' Class 9 registrations for SMART TOUCH and TOUCHSMART, by arguing that these marks differ in appearance, sound, connotation and commercial impression.

HP cannot distinguish the parties' marks. They are made up of the identical words, only reversed. This transposition does not change the overall commercial impression. *See In re Nationwide Industries Inc.*, 6 USPQ2d 1882 (TTAB 1988) (RUST BUSTER for rust-penetrating spray lubricant held likely to be confused with BUST RUST for penetrating oil); *In re General Tire & Rubber Co.*, 213 USPQ 870 (TTAB 1982) (SPRINT STEEL RADIAL for

tires held likely to be confused with RADIAL SPRINT for tires). HP's interpretation of its mark as an imperative sentence urging consumers to "touch smartly" is overreaching – HP's mark is TOUCHSMART, not TOUCHSMARTLY.

HP further argues that the TOUCHSMART mark is always preceded by the "HP" house mark, and that use without the HP house mark would violate brand guidelines. HP Main Brief at p. 22. This might be relevant in the likelihood of confusion infringement determination, but is irrelevant in the §2(d) registration determination.

2. The Common Elements Make Confusion Likely

a. "Smart" and "Touch"

Interestingly, HP argues that the elements of the parties' marks are descriptive for technology products – and also weak – yet it sought registration of TOUCHSMART as distinctive for computer products. HP Main Brief at p. 25.

The Board should not entertain HP's apparent attack on the validity of Nartron's registration, as HP did not file a counterclaim or a separate petition to cancel the registration. Indeed, Nartron's registration is incontestable.

b. SMART TOUCH is a Strong Mark

HP also, confusingly, argues that SMART TOUCH is weak because "there are a multitude of marks using 'smart' and/or 'touch' in International Class 9." HP's Main Brief at p. 26. HP references its following exhibits in support of this argument:

- Exhibits 7-31 of Respondent's Notice of Reliance, which it claims are registrations for other marks using "smart" in International Class 9,
- Exhibits 53-67 of Respondent's Notice of Reliance, claimed to demonstrate actual use of such "smart" formative marks,

- Exhibits 32-41 of Respondent’s Notice of Reliance, which it claims are registrations for other marks using “touch” in International Class 9, and
- Exhibits 68-73 of Respondent’s Notice of Reliance, claimed to demonstrate actual use of such “touch” formative marks.

HP merely references the above-listed exhibits without further analysis. HP simply states that the “multitude of marks using ‘smart’ and/or ‘touch’” are in International Class 9.

Evidence of registration is not evidence of use of the marks by third parties, or that consumers have been exposed to them. *See Scarves by Vera, Inc. v. Todo Imports, Ltd.*, 544 F.2d 1167, 1173 (2d Cir. 1976) (rejecting evidence of third party registration of similar marks on strength of mark issue where “[d]efendant introduced no evidence that the trademarks were actually used by third parties, that they were well promoted or that they were recognized by consumers” because “the existence of these registrations is not evidence of what happens in the market place or that customers are familiar with their use”); *see also National Aeronautics and Space Administration v. Record Chemical Co.*, 185 USPQ 563 (TTAB 1975) (third-party registrations are not evidence of what happens in the marketplace or that the public is familiar with the use of those marks); *and Olde Tyme Foods, Inc. v. Roundy's, Inc.*, 961 F.2d 200, 22 USPQ2d 1542, 1545 (Fed. Cir. 1992) (third-party registrations are not entitled to any weight when evaluating the strength of plaintiff’s marks).²

² For example, Exhibit 53 to Respondent’s Notice of Reliance is claimed to be a printout of a 2007 press release for a third-party’s “smartTouch garage door opener,” which is not an offer for sale and should not be construed as evidence of use. Furthermore, as shown in Exhibit 4 to Petitioner’s Rebuttal Notice of Reliance, the press release was not accessible at the time Petitioner filed its Rebuttal Notice of Reliance.

Moreover, HP neglects to indicate whether the marks identified in the above-listed exhibits are for goods or services related to Nartron's goods. Although evidence of third party usage of similar marks on similar goods is relevant to show that the mark is relatively weak and entitled to a narrower scope of protection, HP does not even argue that the marks identified in the above-listed exhibits are used on similar goods.

Additionally, HP disregards Nartron's successful enforcement of its SMART TOUCH mark in numerous proceedings before the Board and in civil actions. HP mistakenly dismisses Nartron's enforcement history as "meaningless." HP Main Brief at p. 27. Successful enforcement actions can serve to enhance the distinctiveness of a mark.

c. SMART TOUCH is Distinctive

HP states that SMART TOUCH is neither arbitrary nor distinctive. HP Main Brief at p. 27. If SMART TOUCH is not distinctive, why did HP apply to register a mark with the identical formatives, only transposed?

3. HP'S Selection of TOUCHSMART

Finally, HP claims that there is no evidence of anything other than HP's good faith in its selection of the TOUCHSMART mark. HP Main Brief at p. 27. HP makes this claim despite refusing to produce in discovery any search report underlying its adoption of TOUCHSMART. HP claims that identifying the search report – which is discoverable – in a privilege log is the *opposite* of concealment, and that Nartron is at fault for not moving to compel disclosure of the search report. In short, it would be poor policy to allow HP to rely on its failure to produce a search report – when a Protective Order was in place – as evidence of its *good* faith in selection of the TOUCHSMART mark.

III. EVIDENTIARY OBJECTIONS

A. Nartron's Notice of Reliance Exhibit 5 / Washeleski Exhibit 15

Exhibit 5 to Petitioner's Notice of Reliance and Exhibit 15 to Mr. Washeleski's deposition is an article titled "Cypress's PSoC® CapSense Enables Touch Sensing Inside HP Compaq Notebook PCs," AECCafe.com, May 9, 2007, available at <http://www10.aeccafe.com/nbc/articles/1/388459/Cypress-PSoCR-CapSense-Enables-Touch-Sensing-Inside-HP-Compaq-Notebook-PCs>, accessed September 23, 2010 (identical article printed October 12, 2009 from AECCafe.com produced as Petitioner's Bates Nos. N00000005–6 and Washeleski Dep., Ex. 15).

HP argues this is inadmissible to the extent offered for the truth of the matter asserted--that HP uses embedded capacitive sensors in its computers--because it is hearsay and does not fall within any exception to the hearsay rule, citing Fed. R. Evid. 801, 802.

Exhibit 5 is admissible under the "commercial publication" exception of Rule 803(17). Exhibit 5 is also admissible under the "residual exception" of Rule 807 because of its circumstantial guarantee of trustworthiness.

B. Nartron's Notice of Reliance Exhibit 7 / Washeleski Exhibit 23

Exhibit 7 to Petitioner's Notice of Reliance and Exhibit 23 to Mr. Washeleski's deposition is an article titled "GM gives \$2B contract to Hewlett Packard," Freep.com, July 21, 2010 (also produced as Washeleski Dep., Ex. 23).

HP argues this is inadmissible to the extent offered for the truth of the matter asserted--that HP entered into a \$2 billion contract with GM--because it is hearsay and does not fall within any exception to the hearsay rule, citing Fed. R. Evid. 801, 802.

This article also appears on the HP website, and is not hearsay, and HP waived any objection by relying on this exhibit in their Main Brief. Rule 801(d)(2) (party admission).

C. Nartron's Notice of Reliance Exhibit 8 / Washeleski Exhibit 24

Exhibit 8 to Petitioner's Notice of Reliance and Exhibit 24 to Mr. Washeleski's deposition is a printout from HP's website titled "General Motors Renews \$2 Billion HP Enterprise Services Agreement Supporting Vehicle Design and Production," HP.com, July 21, 2010, accessed September 1, 2010 (Washeleski Dep., Ex. 24).

HP argues this is inadmissible because it was not properly authenticated and therefore lacks foundation, citing Fed. R. Evid. 901. However, this printout is from HP's website.

D. Nartron's Notice of Reliance Exhibit 9 / Washeleski Exhibit 25

Exhibit 9 to Petitioner's Notice of Reliance and Exhibit 25 to Mr. Washeleski's deposition is an article from HP's website, "HP in the Motor City," available at <http://h30507.www3.hp.com/t5/The-Next-Big-Thing/HP-in-the-Motor-City/ba-p/81813>, accessed September 23, 2010 (also accessed September 1, 2010 and produced as Washeleski Ex. 25).

HP argues this is inadmissible because it was not properly authenticated and therefore lacks foundation, citing Fed. R. Evid. 901. However, this article is from HP's website.

E. Nartron's Notice of Reliance Exhibit 10 / Washeleski Exhibit 28

Exhibit 10 to Petitioner's Notice of Reliance and Exhibit 28 to Mr. Washeleski's deposition is a brochure from HP's website, "HP solutions for the automotive industry," http://h20338.www2.hp.com/enterprise/downloads/COL_FINAL_8_Pg_New_Auto_Bro_LOW_RES.pdf, accessed September 23, 2010 (also accessed September 1, 2010 and produced as Washeleski Ex. 28).

HP argues this is inadmissible because it was not properly authenticated and therefore lacks foundation, citing Fed. R. Evid. 901. However, this brochure was obtained from HP's website.

F. Nartron's Notice of Reliance Exhibit 11 / Washeleski Exhibit 20

Exhibit 11 to Petitioner's Notice of Reliance and Exhibit 20 to Mr. Washeleski's deposition is a brochure from HP's website, "Improving automotive industry outcomes," available at <http://h20195.www2.hp.com/V2/GetPDF.aspx/4AA1-4190ENN.pdf>, accessed September 23, 2010 (Petitioner's Bates Nos. N49– N60; Washeleski Ex. 20).

HP argues this is inadmissible because it was not properly authenticated and therefore lacks foundation, citing Fed. R. Evid. 901. However, this brochure was obtained from HP's website.

G. Nartron's Notice of Reliance Exhibit 12 / Washeleski Exhibit 21

Exhibit 12 to Petitioner's Notice of Reliance and Exhibit 21 to Mr. Washeleski's deposition is Hewlett-Packard Company's Annual Report on Form 10-K for the fiscal year ended October 31, 2008, <http://sec.gov/Archives/edgar/data/47217/000104746908013240/a2189375z10-k.htm>, accessed September 23, 2010 (also accessed October 19, 2009, excerpt produced as Washeleski Dep. Ex. 21).

HP argues this is inadmissible because it was not properly authenticated and therefore lacks foundation, citing Fed. R. Evid. 901.

This document is self-authenticated under Rule 901(7).

H. Washeleski Deposition Exhibit 26

Exhibit 26 to Mr. Washeleski's deposition is a printout from HP's website regarding its Automotive Industry Solutions, <http://h10134.www1.hp.com/industries/automotive>, accessed September 1, 2010.

HP argues this is inadmissible because it was not properly authenticated and therefore lacks foundation, citing Fed. R. Evid. 901.

Nartron did not rely on this exhibit in its Main Brief.

I. Washeleski Deposition Exhibit 27

Exhibit 27 to Mr. Washeleski's deposition is a printout from HP's website, "HP/Intel: Simulation drives move to virtual prototyping for the automotive segment," <http://h20338.www2.hp.com/enterprise/us/en/solutions/hpc-cae-partnersolutions-intel-virtual-prototyping.html>, accessed September 1, 2010.

HP argues this is inadmissible because it was not properly authenticated and therefore lacks foundation, citing Fed. R. Evid. 901.

Nartron did not rely on this exhibit in its Main Brief.

J. Exhibits 2-5 to Petitioner's Rebuttal Notice of Reliance

Exhibits 2-5 to Petitioner's Rebuttal Notice of Reliance are printouts of the pages found at the URLs shown in Respondent's Exhibits 60, 72, 42, 53 and 54.

HP argues that these exhibits are inadmissible because they are offered in support of Petitioner's "objections" to certain Internet evidence Respondent submitted. However, Nartron's Exhibits 2-5 were offered as rebuttal evidence to show that the URLs shown in Respondent's exhibits do not lead to the pages shown in Respondent's exhibits, and therefore Respondent's Exhibits 60, 72, 42, 53 and 54 should not be considered as offers for sale of the subject products and should be given no consideration in this proceeding. This is the very purpose of a Rebuttal Notice of Reliance.

IV. CONCLUSION

The marks at issue – SMART TOUCH and TOUCHSMART – are, at the very least similar, if not identical.

The goods are legally identical – “electronic proximity sensors and switching devices” and computer hardware.

HP cannot rely on any possible differences in the parties’ marketing or trade channels, as the registrations are not so limited and marketing plans can change at any time.

HP cannot rely on any alleged differences in the classes of consumers, as the registrations are not so limited and “the mere fact that one is skilled, for example, in buying computer parts does not necessarily mean that he is also skilled in the art of distinguishing between similar trademarks.” J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition § 23:103 (4th ed.).

HP is the newcomer and there is no justification for HP’s selection of a mark likely to cause confusion.

The evidence before the Board on the relevant *duPont* factors demonstrates that a likelihood of confusion exists. Accordingly, Nartron respectfully requests that the Board grant the Petition to Cancel.

Respectfully submitted,

BROOKS KUSHMAN P.C.

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Dated: May 5, 2011

CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of **PETITIONER'S REBUTTAL BRIEF** has been served on May 5, 2011 by:

 delivering

 ☒ mailing (via First-Class mail)

a copy to:

Diana D. Digennaro
HOWARD, RICE, NEMEROVSKI,
CANADY, FALK & RABKIN
Three Embarcadero Center
Seventh Floor
San Francisco, CA 94111

Attorney for Respondent



Hope V. Shovein

CERTIFICATE OF TRANSMISSION

I hereby certify that **PETITIONER'S REBUTTAL BRIEF** was filed on the same day with the Trademark Trial and Appeal Board by electronically filing through the Electronic System for the Trademark Trial and Appeals at <http://estta.uspto.gov>.

On this 5th day of May, 2011.



Hope V. Shovein